

Section	Violation	Willful violation
(b) and (c) Railroad and employee failures .....	7,500	11,000

<sup>1</sup> Except as provided for in §218.57, a penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$105,000 for any violation where the circumstances warrant. See 49 CFR part 209, appendix A.

[53 FR 52928, Dec. 29, 1988, as amended at 54 FR 5492, Feb. 3, 1989; 58 FR 43293, Aug. 16, 1993; 60 FR 11050, Mar. 1, 1995; 63 FR 11621, Mar. 10, 1998; 72 FR 51196, Sept. 6, 2007; 73 FR 8503, Feb. 13, 2008; 73 FR 79701, Dec. 30, 2008; 77 FR 24420, Apr. 24, 2012]

#### APPENDIX B TO PART 218—STATEMENT OF AGENCY ENFORCEMENT POLICY ON BLUE SIGNAL PROTECTION FOR UTILITY EMPLOYEES

The following examples of the application of the train or yard crew exclusion from required blue signal protection for utility employees are provided to clarify FRA's enforcement policy. In the first four examples, the utility employee is properly attached to and functioning as member of a train or yard crew and is excluded from blue signal protection, provided all the conditions specified in §218.22 are met:

*Example 1:* A utility employee assists a train crew by adding or reducing railroad cars to or from the train. The utility employee may perform any duties which would normally be conducted by members of the train crew, i.e., setting or releasing handbrakes, coupling air hoses and other connections, prepare rail cars for coupling, and perform air brake tests.

*Example 2:* A utility employee is assigned to assist a yard crew for the purpose of classifying and assembling railroad cars. The yard crew onboard their locomotive arrives at the location in the yard where the work is to be performed. At that time, the utility employee may attach himself to the yard crew and commence duties as a member of that yard crew.

*Example 3:* A utility employee is assigned to inspect, test, remove and replace if necessary, a combination rear end marking device/end of train device on a through freight train. The utility employee attaches himself to the train crew after the arrival of the train and its crew at the location where this work is to be conducted. He may then perform duties as a member of that crew.

*Example 4:* A railroad manager who properly attaches himself as a utility employee to a train or yard crew, in accordance with §218.22, may then function as a member of the train or yard crew under the exclusion provided for train and yard crews.

NOTE: In the last four examples, any railroad employee, including regularly assigned crew members, would need blue signal protection to perform the described function.

*Example 5:* Prior to the arrival of a through freight train, a utility employee installs an end-of-train device on one end of a block of railroad cars that are scheduled to be picked up by the freight train.

*Example 6:* A railroad employee attaches himself to a train or yard crew while the crew is in the ready room preparing to take charge of their train. Prior to the train crew leaving the ready room and taking charge of the equipment, the employee couples air hoses and other connections between the locomotives.

*Example 7:* A railroad employee is attached to a train crew after the train crew has taken charge of the train. It is necessary for the employee to perform a repair on a rail car, such as replacing a brake shoe, in addition to those duties normally performed by train or yard crew members.

*Example 8:* A train or yard crew, supplemented by three utility employees, has an assigned locomotive and train. The regular crew, including the engineer, has left the train to eat lunch. The utility employees have remained with the train and are coupling air hoses between rail cars in the train.

[58 FR 43293, Aug. 16, 1993]

#### APPENDIX C TO PART 218—STATEMENT OF AGENCY ENFORCEMENT POLICY ON TAMPERING

The Rail Safety Improvement Act of 1988 (Pub. L. 100-342, enacted June 22, 1988) ("RSIA") raised the maximum civil penalties available under the railroad safety laws and made individuals liable for willful violations of those laws. Section 21 of the RSIA requires that FRA adopt regulations addressing three related but distinct aspects of problems that can occur when safety devices are tampered with or disabled. It requires that FRA make it unlawful for (i) any individual to willfully tamper with or disable a device; (ii) any individual to knowingly operate or permit to be operated a train with a tampered or disabled device; and (iii) any railroad to operate such a train.

Because the introduction of civil penalties against individuals brings FRA's enforcement of the rail safety laws into a new era and because the changes being introduced by

this regulation are so significant, FRA believes that it is advisable to set forth the manner in which it will exercise its enforcement authority under this regulation.

#### SAFETY DEVICES COVERED BY THIS RULE

FRA has employed a functional description of what constitutes a safety device under this rule. FRA's wording effectively identifies existing equipment and is sufficiently expansive to cover equipment that may appear in the future, particularly devices associated with advanced train control systems currently undergoing research testing.

FRA has been advised by portions of the regulated community that its functional definition has some potential for confusing people who read the rule without the benefit of the preamble discussions concerning the meaning of this definition. Since this rule is specifically intended to preclude misconduct by individuals, FRA wants this rule to be easily comprehended by all who read it. To achieve that clarity, FRA has decided to specify which types of equipment it considers to be within the scope of this rule and provide some examples of equipment that is not covered. In addition, FRA is ready and willing to respond in writing to any inquiry about any other devices that a party believes are treated ambiguously under this rule. This regulation applies to a variety of devices including equipment known as "event recorders," "alerters," "deadman controls," "automatic cab signals," "cab signal whistles," "automatic train stop equipment," and "automatic train control equipment." FRA does not consider the following equipment to be covered by this rule: Radios; monitors for end-of-train devices; bells or whistles that are not connected to alerters, deadman pedals, or signal system devices; fans for controlling interior temperature of locomotive cabs; and locomotive performance monitoring devices, unless they record data such as train speed and air brake operations. Although FRA considers such devices beyond the scope of the regulation, this does not imply that FRA condones the disabling of such devices. FRA will not hesitate to include such devices at a later date should instances of tampering with these devices be discovered. FRA does not currently perceive a need to directly proscribe tampering with such devices because there is no history of these devices being subjected to tampering.

#### SUBSEQUENT OPERATORS OF TRAINS WITH DISABLED DEVICES

Section 218.57 addresses instances in which one individual has tampered with a safety device and a second individual (a "subsequent operator") knowingly operates a train or permits it to be operated, notwithstanding the presence of the disabled or tampered-with unit. The most common occur-

rence addressed by this provision is the situation in which a train crew encounters a locomotive with a safety device that has been tampered with prior to the crew's assuming responsibility for the locomotive. FRA has structured this provision and its attendant enforcement policy to reflect the fact that instances in which one individual encounters a locomotive that someone else has tampered with are relatively infrequent occurrences.

FRA's regulatory prohibition for subsequent operator conduct reflects the legal standard for individual culpability set forth in the RSIA. Under the relevant statutory standard ("knowingly operates or permits to be operated a train on which such devices have been tampered with or disabled by another person")—now incorporated into §218.57—individuals could be held to a simple negligence standard of conduct, i.e., a standard of reasonable care under the circumstances. FRA's conclusion about the proper interpretation of the word "knowingly" stems from both normal canons of statutory construction and analysis of decisional law concerning the use of similar statutory constructs in the civil penalty context. It is also consistent with other Departmental interpretations of the word as used in similar contexts. (See 49 CFR 107.299, defining "knowingly" under the Hazardous Materials Transportation Act, 49 App. U.S.C. 1801 *et seq.*)

Under that statutory language, the responsible members of the crew could be culpable if either (1) due to their failure to exercise reasonable care, they failed to determine that the safety device was not functioning, or (2) having ascertained that the device was not functioning, still elected to operate the train. Similarly, railroad supervisors who permit or direct that a train with a disabled device be operated after having learned that the safety device is not functioning or after having failed to use reasonable care in the performance of their duties could also be subject to sanction.

However, as a matter of enforcement policy, application of a negligence standard in this particular context presently appears unwarranted. We have seen no evidence of an employee's negligent failure to detect another employee's tampering having caused a safety problem. FRA can effectively attack the known dimensions of the tampering problem by employing an enforcement policy that limits its enforcement actions to situations where individuals clearly had actual knowledge of the disabled device and intentionally operated the train notwithstanding that knowledge.

Therefore, FRA will not take enforcement action against an individual under §218.57 absent a showing of such actual knowledge of the facts. Actual, subjective knowledge need not be demonstrated. It will suffice to show

objectively that the alleged violator must have known the facts based on reasonable inferences drawn from the circumstances. For example, it is reasonable to infer that a person knows about something plainly in sight on the locomotive he is operating. Also, unlike the case where willfulness must be shown (see FRA's statement of policy at 49 CFR part 209, appendix A), knowledge of or reckless disregard for the law need not be shown to make out a violation of §218.57. The knowledge relevant here is knowledge of the facts constituting the violation, not knowledge of the law.

Should FRA receive evidence indicating that a stricter enforcement policy is necessary to address the tampering problem, it will revise its enforcement policy to permit enforcement actions based only on a showing of the subsequent operator's negligent failure to detect the tampering, as the relevant provision of the RSIA permits it to do now. Any such change in enforcement policy will become effective only after publication of a revised version of this appendix.

[54 FR 5492, Feb. 3, 1989. Redesignated and amended at 58 FR 43293, Aug. 16, 1993]

#### APPENDIX D TO PART 218—REQUIREMENTS AND CONSIDERATIONS FOR IMPLEMENTING TECHNOLOGY AIDED POINT PROTECTION

##### INTRODUCTION

This appendix provides further explanation and requirements for exercising the option to provide point protection with the aid of technology as permitted in §218.99(b)(3)(i). The regulation permits the visual determination necessary to provide point protection, i.e., a determination that the track is clear, for a shoving or pushing movement to "be made with the aid of monitored cameras or other technological means, provided that it and the procedures for use provide an equivalent level of protection to that of a direct visual determination by a crewmember or other qualified employee properly positioned to make the observation as prescribed in this section and appendix D to this part." This appendix addresses the general requirements and considerations for all technology aided point protection as well as specific additional requirements for those operations involving remote control operations at public highway-rail grade crossings, private highway-rail grade crossings outside the physical confines of a railroad yard, pedestrian crossings outside the physical confines of a railroad yard, and yard Access Crossings.

##### I. GENERAL REQUIREMENTS AND CONSIDERATIONS

A. Although railroading is now one of the nation's older forms of mechanized transportation, equipment, components and operations all have evolved through new and improved technologies. Installing cameras in yards so that a location could be remotely monitored from somewhere else has become a railroading reality as cameras have become smaller, less expensive, and have increased resolution. It is possible to set up these cameras and monitors so that they provide at least an equivalent level of safety to that of an employee protecting the point. Part 218, subpart F permits such an operation to substitute for an employee's direct visual determination where the technology provides an equivalent level of protection to that of a direct visual determination. See §218.99(b)(3)(i). Of course, to provide an equivalent level of protection, an employee needs to be properly qualified (see §218.95(a)(2)) and the technology must work as intended. Most malfunctions of the technology should be detectable, and result in abandoning the use of the technology for determining point protection until the malfunction can be corrected.

B. The substitution of such technology for a direct visual determination is dependent on many factors. Each situation will have its own particular factual circumstances that shall require consideration in determining whether an equivalent level of safety can be achieved. For instance, with regard to the basic camera setup, a railroad shall consider whether an operator must see in color (largely a necessity if viewing signals), the width of the angle of view, the size and location of the monitor, whether the technology is for day-time use only, and whether its use should be limited to fair weather conditions. However, under all circumstances, the monitor shall display sufficient information to enable the viewer to make a determination that the track ahead of the shoving or pushing move is clear pursuant to the definition of "track is clear" in §218.93.

C. Each railroad that chooses to implement such camera/monitor setups shall implement attendant procedures and qualify each employee who will be utilizing the technology. Railroads shall ensure that any monitored camera has sufficient resolution and real time coverage to provide protection equal to a direct visual determination. See §218.99(b)(3)(i). Concerning attendant procedures, one such procedure may be for an employee viewing a monitor to communicate updates to the locomotive engineer or controlling crewmember at appropriate intervals. FRA equates the employee monitoring the camera to the employee controlling the movement who must not engage in any task unrelated to the oversight of the movement;